WP(C) 8549/2004
BEFORE
HON'BLE JUSTICE B.K. SHARMA
IN THE HIGH COURT OF
(The High Court of Assam, Nagaland, Meghalaya,
Manipur, Tripura, Mizoram and Arunachal Pradesh)

1) W.P. (C) No.8549/2005

Mrs. Gunalata Dutta,
W/o. Shri Ganesh Chandra Saikia
R/o. Nehru Park
P.O. & Dist. Jorhat, Assam at present
Holding the post of Head Assistant in the
Office of the Joint Director of Health Service,
Jorhat, Assam

& Petitioner

vs.

1) State of Assam
Represented by the Commissioner and Secretary
To the Govt. of Assam Health and Family Welfare (A)
Department, Dispur, Guwahati-6

2) The Director of Health Services,
Assam, Hengrabari, Guwahati-36

3) The Joint Director of Health Services, Jorhat
P.O. & District- Jorhat, Assam

4) The Superintendent
Jananayak Debeswar Sharma
Civil Hospital, Jorhat,
P.O. & Dist. Jorhat, Assam

5) Mrs. Moni Bhuyan
W/o. Shri Suren Bhuyan
Choladhora, Jorhat
P.O. & Dist. Jorhat, Assam

6) Shri Khireswar Borah
S/o. Late Sarukon Borah
L.D. Assistant,
Jananayak Debeswar Sharma
Civil Hospital, Jorhat,
P.O. & Dist. Jorhat, Assam

& Respondents

2) W.P. (C) No. 5513/2005

Mrs. Gunalata Dutta,
W/o. Shri Ganesh Chandra Saikia
R/o. Nehru Park
P.O. & Dist. Jorhat, Assam at present
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W/o. Shri Suren Bhuyan
Choladhora, Jorhat
P.O. & Dist. Jorhat, Assam

&Respondents

BEFORE

THE HON'BLE MR. JUSTICE B.K. SHARMA

For the petitioner : Mr. K.H. Choudhury, Sr. Counsel
Mr. B.P. Borah,
Mr. D. Borah, Advocates

Mr. For the respondents: Mr. A.K. Goswami, Sr. Counsel
Ms. R. Chokraborty, G.A.
Mr. J. Handique, Advocate

Date of hearing & Judgment: 25.05.07

JUDGEMENT AND ORDER (ORAL)

1. This is a unique case of its kind, in which the petitioner, in her over jealousness to cling to the post of Head Assistant, has done her best, with the support of her controlling officer, in violation of the directions of the Higher authorities as well as the orders passed by this Court.

2. As a consequence thereof she has been placed under suspension pending drawl of departmental proceeding which has been put to challenge in the second writ petition. In the first writ petition her challenge is to the order passed promoting the respondent No. 5 to the post of Head Assistant earlier being held by her.

3. Both the writ petitioner and the respondent No. 5 were in the rank of UDA under the Joint Director of Health Services, Jorhat. There is no dispute that the respondent No. 5 is senior to the petitioner. However, by order dated 31.11.03, the Joint Director of Health Services, Jorhat allowed the petitioner to officiate at Head Assistant against the vacancy caused due to retirement of the incu

mbent. It was indicated that the arrangement was purely temporary and subject t o modification. It will be pertinent to mention here that the copy of the order was not endorsed to the Director of Health Services.

4. The petitioner jointed the post of Head Assistant and thereafter by her application dated nil of February, 2004 made a prayer to the Director of Health Services for approval of her promotion. Her such application would go to show th at she was aware that her promotion as Head Assistant was to be approved by the Director of Health Services. The Joint Director of Health Services, Jorhat forwa rded her application to the Director of Health Services for necessary approval. However, no such approval was accorded.

5. When the matter rested thus, the Joint Director of Health Services, Jorh at by his order dated 05.03.04 appointed the petitioner as Head Assistant agains t the said retirement vacancy indicating that her appointment as such was with the approval of the Director of Health Services. However, on perusal of the endo rsement made to the Director of Health Services, Assam it appears that no such a pproval was there, rather request was made to approve the appointment of the pet itioner. For a ready reference, the order dated 05.03.04 (Annexure-D) along wit h the endorsement to the Director of Health Services is quoted below:

Partial modification of this office order No. 12050-52 dated 30.11.03, Smti. Gu nalata Dutta, Senior Upper Division Assistant is hereby appointed after completi on of 3 (three) months vice Shri N.H. Phukan, Temp. Head Assistant retired on 30 .11.03 after proper approval from the Director of Health Services, Assam Hengrab ari, Guwahati-16 vide his letter No. HSE/Promotion/261/03/8279 dated 06.09.03.

Sd/-

Joint Director of Health Services
Jorhat
Memo No. JDHS/promotion/02-03/2508-10 dated Jorhat the 5th March, 2004

Copy forwarded for favour of information and necessary action to

1) The Director of Health Services, Assam Hengrabari Guwahati-36. He is req uested to approve the above mentioned Senior U.D.A. Smti. Gunalata Dutta. Head A ssistant vide your letter No. HSE/promotion/261/03/8279 dated 06.09.03 addressed to the Secretary to the Govt. of Assam, Dispur, Guwahati-6 with a copy of the J oint Director of Health services, Jorhat.
2) Smti Gunalata Dutta, Head Asstt.
3) The Accounts Branch (Int).

6. After the aforesaid appointment of the petitioner as Head Assistant, she made further representation in September, 2004 to the Director of Health Servic es praying for approval of her promotion and, as on the earlier occasions the Jo int Director of Health Services forwarded her representation to the Director.

7. The Director of Health Services did not accord his approval to the promo tion of the petitioner made by the Join Director of Health Services, rather prom oted the respondent No. 5 as Head Assistant to the vacant post, by his order da ted 09.11.04 (Annexure-H). In the order it has been clearly indicated that the r espondent No. 5 is the seniormost UDA under the control of the Joint Director of Health Services, Jorhat. The Director of Health Services also passed consequent ial order of promotion dated 10.11.04 promoting the respondent No. 6, the LDA to the vacant post of UDA vice the respondent No. 5.

8. The petitioner made a challenge to Annexure-H order dated 09.11.04 promo ting the respondent No. 5 as Head Assistant by filing the writ petition being W .P.(C) No. 8549/04 (hereinafter described as the first writ petition). The writ petition was entertained by order dated 29.11.04 by way of issuance of notice an d it was observed that the promotion of the respondent No. 5 would be subject to outcome of the writ petition. Thus, there was no stay order in respect of the i

mpugned order dated 09.11.04. In such a situation, there can not be any dispute, that in the normal circumstances, it is the respondent No. 5 who would have continued as Head Assistant pursuant to her promotion as such and the petitioner would have reverted back to her substantive post of UDA. However, strangely enough it is the petitioner, inspite of joining of the respondent No. 5 as Head Assistant, continued to draw her salary as Head Assistant to the deprivation of the respondent No. 5.

9. During the pendency of the writ petition, the Director of Health Services directed the Joint Director of Health Services, Jorhat by his letter dated 11.03.05 to release the petitioner from the post of Head Assistant and to realize the excess amount from the petitioner which she had drawn as Head Assistant. This direction as contained in the letter dated 11.03.05 was put to challenge by the petitioner by filing an application in the pending writ petition which has been registered and numbered as Misc. Case No. 825/05. By order dated 06.04.05 passed in the Misc. case, it was provided that no recovery shall be made from the petitioner.

10. When the petitioner continued to receive her salary as Head Assistant to the deprivation of the respondent No. 5, it was the turn of the respondent No. 5 to approach this Court by filing Misc. case No. 1419/05 in the pending writ petition. By order dated 13.06.05, this Court clarified the earlier order dated 06.04.05 passed in Misc. case No. 825/05 indicating that, only recovery was stayed and the other part of the letter dated 11.03.05 by which the direction was issued to release the petitioner from the post of Head Assistant and that the respondent No. 5 would continue as Head Assistant was not stayed. Even this clarification issued by this Court was ignored by the petitioner as well as by the Joint Director of Health Services, Jorhat. The Joint Director continued to pay salary to the petitioner as Head Assistant and the petitioner also readily and gladly accepted the same knowing it fully well that she could no longer continue as Head Assistant in view of the order passed on 09.11.04 promoting the respondent No. 5 as Head Assistant which post, the respondent No. 5 had also joined.

11. When the respondent No. 5 was not paid her salary she once again approached this Court by filing Misc. case No. 3466/06 praying for a direction to release her salary. This Court upon hearing the parties passed the order dated 15.11.06 for early hearing of the matter. Thus the matter has been taken up for hearing along with the second writ petition filed by the petitioner challenging the order of suspension. In the order passed on 13.06.05 in Misc. Case No. 1419/05 this Court while clarifying the earlier order dated 06.04.05 passed in Misc. Case No. 825/05 also ordered for payment of salary to the respondent No.5. Inspite of such order, the Joint Director of Health Services continued to pay salary to the petitioner as Head Assistant, and not to the respondent No. 5. It is submitted that the respondent No. 5 has been paid her salary in the promotional post of Head Assistant only w.e.f. April, 2007, although pursuant to the order of promotion dated 09.11.04 she has joined the post of Head Assistant and discharging the duties and function as such. Thus, here is a case in which although, the respondent No. 5 has been promoted as Head Assistant with automatic reversion of the petitioner as UDA , but it is the petitioner who had been receiving salary for the post of Head Assistant till April, 2007 to the deprivation of the respondent No. 5. This kind of a situation leads to irresistible conclusion that the Joint Director of Health Services, Jorhat along with the petitioner created the situation toward defiance of the order passed by the higher authorities as well as by this Court. This is really a matter of serious concern.

12. Mr. K.H. Choudhury, learned Sr. counsel appearing for the petitioner submits that the respondent No. 5 could not have been promoted as Head Assistant without considering the case of the petitioner. At one stage of hearing, he clearly admitted that although it is the respondent No. 5 who has been shouldering the responsibility of the post of Head Assistant, but it is the petitioner who

used to receive the salary as Head Assistant. Referring to the order of suspension under challenge to the second writ petition he has submitted that there is no fault on the part of the petitioner and she has acted as per her own understanding of the orders passed by this Court as well as by the higher authorities. He submits that at best there could be misunderstanding and/or misinterpretation of the orders so passed, but certainly the petitioner is not guilty of any misconduct requiring to place her under suspension and to proceed against her by way of a departmental proceeding.

13. On the other hand, Mr. A.K. Goswami, learned Sr. counsel representing the respondent No. 5 submits that there are overwhelming materials to show that the Joint Director of Health Services, Jorhat merrily defied the orders of the higher authorities as well as of this Court. He submits that, it is really a sorry state of affair in a Govt. department in which so much of favouritism could be shown to the petitioner by the Joint Director of Health Services even by way of defiance of the orders of the higher authorities as well as of this Court. Stating about the predicament which the respondent No. 5 had to face due to non receipt of salary for the last about three years due to manipulation on the part of the petitioner in collaboration with the Joint Director of Health Services, he submits that such matter requires serious steps to avoid recurrence in future.

14. Ms. R. Chokraborty, learned Addl. Sr. Govt. Advocate, submits that when the respondent No. 5 was promoted as Head Assistant by the Director of Health Services, Assam the Joint Director of Health Services, Jorhat could not have objected to the same. She submits that when the order of promotion of the respondent No. 5 was not stayed by this Court and the matter was further clarified, the Joint Director of Health Services could not have allowed the petitioner to receive the salary as Head Assistant. She further submits that the petitioner also ought not have accepted the salary as Head Assistant knowing it fully well that she was not entitled to such salary.

15. Mr. J. Handique, learned counsel appearing for the Joint Director of Health Services, Jorhat, namely Dr. Ananda Mohan Das, submits that whatever has been done by said Dr. Das, same was bonafide. He submits that there was no defiance of the order passed by the higher authorities or by this court, by said Dr. Das.

16. In the affidavit filed by the respondent No. 3, i.e. the Joint Director of Health Services (Dr. Ananda Mohan Das), instead of expressing any regret for what he had done in the matter, he has tried to justify his action by stating even to the extent that the petitioner and the respondent No. 5 belong to two different cadres. It is his stand, that while the petitioner is under the control of the Joint Director of Health Services, the respondent No. 5 is under the control of the Superintendent of Civil Hospital, Jorhat unmindful of the fact that it is the Joint Director of Health Services himself, who had prepared the seniority list of UDAs under his control on 20.07.04 (Annexure-2 to Misc. case No. 3466/06). In the said seniority list the name of the respondent No. 5 figure at serial No. 2 while that of the petitioner at No. 3. As per the particulars furnished in the list, as against the date of joining of the respondent No. 5 as LDA on 15.06.73, the date of joining of the petitioner is 29.03.75. Likewise, the date of joining of the respondent No. 5 as UDA is also ahead of the petitioner which is 21.01.92 as against that of the petitioner on 22.06.93. In the remark column it was indicated that the respondent No. 5 was working in the Civil Hospital while the petitioner was officiating as Head Assistant.

17. The aforesaid seniority list prepared on 20.07.04 was during the tenure of the respondent No. 3 (Dr. Ananda Mohan Das) who in his affidavit has clearly stated in paragraph 4, that he had joined the post of Joint Director of Health Services on 01.03.04. As per the statement made in paragraph-8 of his affidavit, he was transferred from Jorhat to Karimganj in the first week of April, 2005.

Thus his stand in the affidavit about there being two separate cadres is nothing but a false statement. In fact, Mr. K.H. Choudhury, learned counsel for the petitioner fairly submits that the stand of there being two separate cadres, is not tenable.

18. Whatever may be the reason which the Joint Director of Health Services has tried to project, he could not have defied the orders of the higher authorities, i.e. the Director of Health Services. It is the Director of Health Services whose approval in the matter of promotion as Head Assistant is required, which the petitioner never had. On the other hand, the Director of Health Services promoted the respondent No. 5 by the aforesaid order dated 09.11.04 which under no circumstances could have been defied by the Joint Director of Health Services.

19. In paragraph-6 of the affidavit filed by Dr. Das, it has been stated that before the order passed by the Director of Health Services promoting the respondent No. 5 as Head Assistant, it was the petitioner who was promoted by him. According to him, since the respondent No. 5 at the time of promotion as Head Assistant was working in the Civil Hospital, Jorhat before releasing her from the hospital enabling her to join the promotional post, he ought to have been consulted by the Superintendent of Civil Hospital. From the tenor of the stand of Dr. Das in his affidavit, what has transpired is that he is still justifying his action towards defiance of the orders passed by the Director of Health Services and the orders of this Court. It is not is case that he misconstrued the orders of this Court. He has also not expressed any regret for what he has done. . It appears that he has already retired from service on attaining the age of superannuation w.e.f. 28.02.06.

20. From the materials on record, it also appears that the plea of the petitioner that her case was not considered for promotion as Head Assistant is not correct. It is the Joint Director of Health Services, who by his letter dated 11.09.03 (Annexure-I to the affidavit in opposition filed by the respondent No. 5 on 09.03.05), asked the petitioner and the respondent No. 5 along with one Miss Gitanjali Hazarika, being the senior most UDAs under the Joint Director of Health Services, to submit their willingness for acceptance to officiate as Head Assistant in the Office of the Joint Director of Health Services, Jorhat in respect of the vacancy that would arise w.e.f. 30.11.03 on retirement of the incumbent, namely Shri H.N. Phukan. Be it stated here that it is the same very post against which the petitioner was temporarily accommodated by the Joint Director of Health Services.

21. In response to the said letter dated 11.09.03, the respondent No. 5 and others responded and offered their willingness. In paragraph-7 of the affidavit in opposition filed by the Director of Health Services, it has been categorically stated that the Selection Board in its meeting held on 06.10.04 scrutinized the proposal for promotion as Head Assistant and selected the respondent No. 5. The seniority list which was furnished by the Joint Director of Health Services was placed before the Selection Board and the Selection Board selected the respondent No. 5, she being the senior most UDA and not being unfit for promotion. Thus, it cannot be said that the case of the petitioner was not considered by the Selection Board.

22. After the promotion of the respondent No. 5 by the aforesaid order dated 09.11.04, she was released from the Civil Hospital by the Superintendent vide letter dated 23.11.04. She joined the promotional post of Head Assistant on the same date by submitting her joining report. From the endorsement on the joining report made by the Joint Director of Health Services, it appears that her joining report was forwarded to the Director of Health Services. Thus, although the respondent No. 5 had been shouldering the responsibility of the promotional post w.e.f. 23.11.04, but yet it is the petitioner who was preferred by the Joint Director of Health Services and he continued to pay salary as such to her to the de

privation of the respondent No. 5. The respondent No. 5 was not paid her salary since 23.11.04 and it is only amidst the hearing of the case, she has been paid her current salary from April, 2007.

23. During the course of hearing, learned State counsel has produced the cop y of the letter dated 23.04.07 issued by the Joint Director of Health Services t o the Director of Health Services forwarding therewith the statement that the ar rear salary in respect of the respondent No. 5 amounting to Rs. 2,00,085/- is re quired to be drawn. Needless to say that the respondent No. 5 is entitled to he r salary as Head Assistant, but ironically it is the petitioner whose temporary promotion as Head Assistant which ceased to have any effect after promotion of the respondent No. 5 by virtue of the order dated 09.11.04 and her joining as s uch on 23.11.04, continued to receive salary as Head Assistant at the behest of the Joint Director of Health Services. The petitioner also ought not have accept ed the salary as such.

24. The illegal action on the part of Dr. Ananda Mohan Das, the then Joint D irector of Health Services is further reflected from Annexure-J letter dated 06. 01.05 by which the respondent No. 5 was directed to work as UDA in the Civil Hos pital from where she has been released. Such direction was stated to be in compl iance of the order dated 29.11.04 passed by this Court in W.P.(C) No. 8549/04. B y order dated 29.11.04 the impugned order for promotion of the respondent No. 5 was never stayed, rather was allowed to operate subject to the condition that th e same would be subject to outcome of the writ petition. Dr. Das not only asked the respondent No. 5 to work as UDA, but also asked the Superintendent of the Ho spital, by the same very letter, to draw salary of the respondent No. 5 as UDA from December, 2004. This is to that extent the Joint Director of Health Service s tried to help the petitioner so that she could continue as Head Assistant insp ite of the orders passed by the higher authorities and refusal of this Court to stay the order of promotion of the respondent No. 5.

25. As noticed above, Dr. Das relinquished the charge as Joint Director of H ealth Services in the first week of April, 2005 and in his place one Dr. G.C. Do ley was posted as such. He also allowed the petitioner to draw her salary as Hea d Assistant to the deprivation of the respondent No. 5. Eventually the petitione r was placed under suspension by said Dr. Doley by the impugned order dated 28.0 7.05 (Annexure-P to the second writ petition). Such a course of action was adopt ed pending drawl of the departmental proceeding. The petitioner made a challenge to this order by filing the second writ petition being W.P.(C) No. 5513/05. In the writ petition, inspite of the aforesaid developments, she described herself as Head Assistant in the office of the Joint Director of Health Services, Jorha t. By making such misleading statement in the writ petition, the petitioner pray ed for interim order. This Court by order dated 03.08.05 suspended the order of suspension dated 28.07.05 by virtue of which the petitioner is still continuing in her active service.

26. As noticed above, it is only from the month of April, 2007 it is the re spondent No. 5 who has been paid her salary as Head Assistant. During the course of hearing Mr. K. H. Choudhury, learned counsel representing the petitioner ha s submitted that the salary of the petitioner even as UDA has been stopped. In t he affidavit in reply filed by the petitioner to the affidavit in opposition fil ed by the respondent No. 5, she has tried to justify her stand in which she clai ms that she still continues to be the Head Assistant inspite of the fact that it is the respondent No. 5 who has been promoted to the post way back in 2004. Thi s affidavit in reply was filed on 19.12.06. Thus, throughout the writ proceeding s, the petitioner has projected that she is the Head Assistant of the establish ment and that the respondent No. 5 has defied the order of the Joint Director of Health Services. She has stated that inspite of the orders passed by the Joint Director of Health Services directing the respondent No. 5 to go back to the est ablishment of the Civil Hospital and to work as UDA, she has not complied with t

he same.

27. There is no question of going back of the respondent No. 5 as UDA to th e office of the Civil Hospital from which she has already been released pursuant to the order of promotion passØd on 09.11.04. She has been released from Civil Hospital and she joined the promotional post on 23.11.04. However, the kind of s ituation created by the petitioner in collaboration with the then Joint Director of Health Services has deprived her salary from the date of assumption of charg e of the promotional post of Head Assistant which is 23.11.04, till April, 20 07.

28. All the aforesaid factual aspects of the matter would go to show that th e petitioner in her desire and over jealousness to cling to the post of Head Ass istant to which she was only temporarily promoted, did everything possible with the active participation of the then Joint Director of Health Services, even t o the extent of misleading this Court. In a sense, both have defied the orders o f this Court. In view of the orders passed by this Court as well as the Director of Health Services, both the petitioner as well as the Joint Director of Health Services were aware of the consequence in which it is the respondent No. 5 wh o was to be given salary as Head Assistant, but yet it is the petitioner who wit hout any order of promotion as Head Assistant continued to enjoy the salary of t he post.

29. Above is precisely the reason, as to why the Director of Health Servic es passed the order dated 11.03.05 (Annexure-O to Misc. case No. 825/05 in W.P. (C) No. 8549/04), directing the Joint Director of Health Services, Jorhat to re alize the excess amount which the petitioner had already drawn as Head Assistant . In the said order there is also direction to allow the respondent No. 5 to con tinue her service as Head Assistant, but yet the Joint Director of Health Servic es did not act as per the said direction and continued to draw the salary of t he petitioner as Head Assistant. In the interim order passed on 06.04.05 in the said Misc. case, only proposed recovery was stayed but other part of the order was not stayed. In that view of the matter, the Joint Director of Health Service s ought to have disallowed the salary to the petitioner as Head Assistant and ou ght to have paid the same to the respondent No. 5. However, he did not do so whi ch has now resulted in the situation in which there will be double payment of sa lary, one on account of legitimate pay and allowance payable to the respondent No. 5, and another on account of illegal payment of the same to the petitioner.

30. For all the foregoing reasons the decision of the successor Joint Direct or of Health Services cannot be faulted with. The petitioner has been placed un der suspension as per the direction of the Director of Health Services to facil itate the departmental enquiry against her.

31. In view of the above, both the writ petitions fail having merited dismi ssal which I accordingly do. The writ petitions are dismissed. All interim or ders passed either in the writ petition or in the Misc. cases in favour of the p etitioner stand vacated.

32. The official respondents shall now take appropriate action in the matte r so that the respondent No. 5 gets her salary in the promotional post of Head A ssistant from the due date. Her arrear salary shall be paid as expeditiously as possible, but not later than 31.07.07, while her current salary shall be paid re gularly on the due date. The official respondents shall ensure recovery of the e xcess amount drawn by the petitioner inasmuch as their cannot be any double paym ent to both the incumbents. Such recovery has also been ordered by the Director of Health Services which was under order of stay of this Court, but the same now stands vacated with dismissal of the writ petitions. In addition, the official respondents shall also take appropriate action in the matter so that there is no

recurrence of such illegal action on the part of the authority of which the petitioner is the beneficiary.

33. The petitioner shall be deemed to be under suspension w.e.f. date on which the order of suspension was passed. Till such time the same is revoked by the authority in accordance with law. It is expected that the departmental proceeding contemplated against her shall be finalized as expeditiously as possible. It is also made clear that the Joint Director of Health Services, namely Mr. Anandra Mohan Das who although has retired from service, can not be absolved of his liability in the entire episode. It is made clear that the action to be initiated against him and the petitioner must be in accordance with the principles of natural justice.

34. The writ petitions are dismissed awarding costs of Rs. 5000/- in each of the writ petition to be recovered from the petitioner by the High Court Registry. All the interim orders passed in both the writ petitions in favour of the petitioner, stand vacated.